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IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES,

Petitioner,

v.

G. FALK & BROTHER,

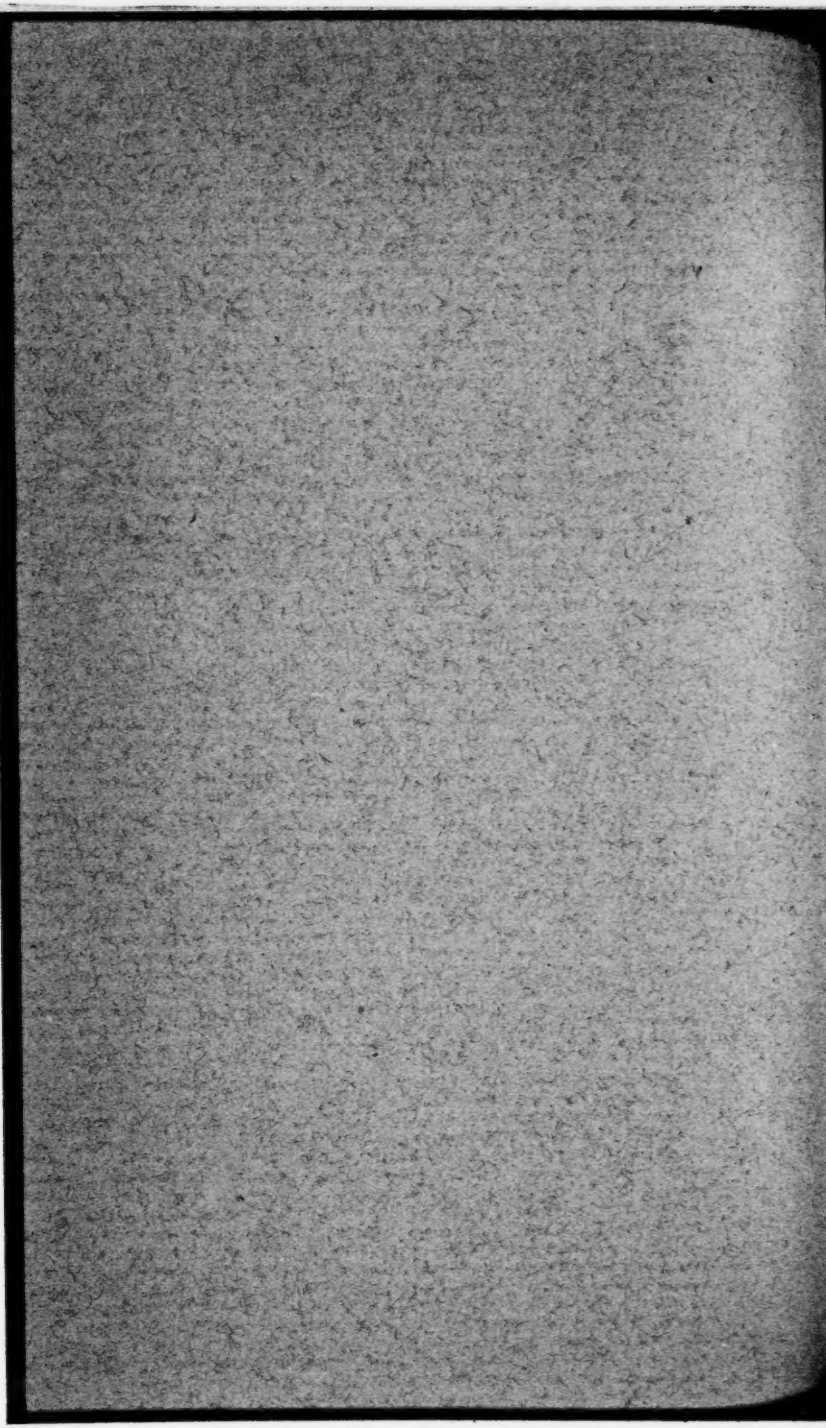
Respondents.

BRIEF FOR RESPONDENTS.

HATCH, KEENER & CLUTE,
100 Broadway,
New York City,
Attorneys for Respondents.

JOHN G. CARLISLE,
EDWARD S. HATCH,
J. STUART TOMPKINS,
Of Counsel.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK



Supreme Court of the United States.

THE UNITED STATES,
Petitioner,

against

G. FALK & BROTHER,
Respondents.

Brief for Respondents.

This appeal comes before this Court on writ of certiorari granted on the application of the United States, on April 30th, 1906.

On undisputed facts the case presents but one question of law, namely, whether the duty on imported tobacco deposited in bonded warehouse should be assessed on its weight plus moisture at the time of entry, or on its weight at time of withdrawal, where, while the goods are in the warehouse, evaporation occurs of the moisture acquired on the ocean voyage.

The tobacco in question was imported from Rotterdam on June 2d, 1902. The total importation consisted of thirty-one bales, numbered 2239 to 2267 inclusive. According to the con-

sular invoice, which is a sworn document and presumptively correct (Greely vs. Thompson, 10 How., 225. 239, 13 L. Ed., 397; U. S. vs. May, 26 Fed., Cas. 1225, One hundred and twenty-three packages of glass, 18 Fed. Cas., 709, 711), the gross weight of the thirty-one bales at the time they left Rotterdam was 2,473.5 kilos =5453.0781 pounds. According to the Government weigher's return (see same attached to entry), the thirty-one bales at the time of landing weighed 5520 pounds, so that the bales had gained 66.9219 pounds through the absorption of moisture on the ocean voyage.

When the bales arrived the importer duly entered them at the Custom House, computing the duties according to the invoice (Art. 416, Customs Regulations 1899), the Collector took a bond in double the amount of the estimated duties (Art. 639, Customs Regulations 1899) and the bales were sent to bonded warehouse (Art. 641, Customs Regulations 1899).

The Collector then proceeded in due course to ascertain the duty. He did this by multiplying the weight of the thirty-one bales at the time of landing, as returned by the U. S. weigher, by $1.85, under Paragraph 213 of the Tariff Act of July 24, 1897, which reads in part as follows:

> "Wrapper tobacco * * * if unstemmed one dollar and eighty-five cents per pound."

Thereafter the importer withdrew from the bonded warehouse portions of the tobacco as he required them. Sometimes he withdrew a number of pounds from a bale; at other times one or more bales, and some of the bales he exported to Canada.

When the importer withdrew a number of pounds from a bale (see withdrawal entries) the collector multiplied that number of pounds by $1.85, demanded and received the amount so ascertained in cash, and discharged the importers bond *pro tanto*. But when the importer withdrew the remainder of the bale the collector did not compute the duty on the actual number of pounds delivered. Instead of that he subtracted the number of pounds already withdrawn from the bale, from the number of pounds which the U. S. weigher reported the bale to weigh at the time of landing (see withdrawal entries). In this manner the collector demanded and received duty on two to three pounds, which were in fact never delivered.

The importer protested against the action of the collector at the time he was required by the collector to pay in cash more than $1.85 a pound on actual number of pounds of tobacco withdrawn from warehouse and entered for consumption, protests being lodged for safety sake not only within ten days after original liquidation but also within ten days after each withdrawal from bonded warehouse and the collector's denial of the importers' demand for reweighal.

The fact, therefore is, that the collector assessed duty on the combined weight, at the time of the entry in bond, of the tobacco and the moisture absorbed during the ocean transportation and at the time of withdrawal refused to reweigh the merchandise, and liquidated the duties in accordance with the original assessment. Protests were duly filed, claiming that the duty should be assessed on the weight of the goods at the time of withdrawal, under the provisions of Section 20 of

the Customs Administrative Act of June 10, 1890, as amended by Section 54 of the Tariff Act of October 1st, 1890, and by the Act of December 15, 1902 (see Brief, p. 6).

All of the goods were withdrawn from warehouses subsequent to the taking effect of the amendment of December 15th, 1902.

The Board of United States General Appraisers overruled the protests on the ground that Section 33 (Brief, p. 7) of the Tariff Act of July 24, 1897, required the duty to be assessed on the weight at the time of entry.

As none of the goods were imported prior to the taking effect of the Tariff Act of 1897, Section 33 was therefore claimed to have no application, being restricted to merchandise imported prior to July 24th, 1897, as was held by the United States Circuit Court for the Southern District of New York, on appeal by the importers from the decision of the Board of United States General Appraisers. But the Circuit Court sustained the assessment of duty on the ground that the case was governed by Section 2983 U. S. R. S. (Brief, p. 7) the Court holding that the evaporation of the moisture was a "loss" within the provisions of that section.

From the decision of the Circuit Court the importers appealed to the United States Circuit Court of Appeals for the Second Circuit, where the decision of the Board of Appraisers and of the Circuit Court was reversed and the protests sustained, that Court saying:

> "It is clear that evaporation of moisture is not 'loss * * * sustained by * * * merchandise.' "

And the Court held that under Section 20 of the

Customs Administrative Act above quoted the goods should pay only such duties as they would be subject to if imported at the time of withdrawal from bonded warehouse.

The government applied to this Court for a review of the case by writ of certiorari, which application was granted on April 30th, 1906, and the writ issued accordingly.

The point presented is, in its last analysis, whether the importer should pay duty on a quantity of moisture, present in the goods after ocean transportation, but which has disappeared before the importer receives the goods or they enter into consumption in the United States, and while they are in the custody of the government in bonded warehouse.

Following are the various provisions of the law which have to be considered on this appeal:

The preamble to the Tariff Act of July 24, 1897, read in connection with **Paragraph 213:**

> "*Be it enacted by the Senate and House of* "*Representatives of the United States of* "*America in Congress* assembled, that on and "after the passage of this Act, unless other- "wise specially provided for in this Act, there "shall be levied, collected and paid upon all "articles imported from foreign countries, "and mentioned in the schedules herein con- "tained, the rates of duty, which are, by the "schedules and paragraphs, respectively pre- "scribed, namely:
>
> * * * * * *
>
> **"213.** Wrapper, tobacco, * * * if un- "stemmed, one dollar and eighty-five cents "per pound."

Section 20 of the Customs Administrative Act of June 20, 1890, as amended by the Act of December 15, 1902, the amendment being shown by italics:

> "Sec. 20. Any merchandise deposited in "any public or private bonded warehouse "may be withdrawn for consumption, within "three years from the date of original im- "portation, on payment of the duties and "charges to which it may be subject by law "at the time of such withdrawal; *provided*, "*that the same rate of duty shall be collected* "*thereon as may be imposed by law upon like* "*articles of merchandise imported at the time* "*of the withdrawal.* And provided further "that nothing herein shall off-set or impair "existing provisions of law in regard to the "disposal of perishable or explosive articles."

As the section had been amended by **Sec. 54 of the Tariff Act of October 1, 1890,** it reads as follows, the italicized words showing the amendment:

> "Sec. 20. Any merchandise deposited in "bond in any public or private bonded ware- "house may be withdrawn for consumption "within three years from the date of original "importation, *on payment of the duties and* "*charges to which it may be subject by law at* "*the time of such withdrawal; provided*, "That nothing herein shall affect or impair "existing provisions of law in regard to the "disposal of perishable or explosive articles."

Prior to the enactment of 1890 the withdrawal provisions were contained in United States Revised Statutes, **Section 2970,** which read:

> "Any merchandise deposited in bond in any "public or private bonded warehouse may be

"withdrawn for consumption within one year "from the date of original importation on pay- "ment of the *duties* and charges *to which it "may be subject by law at the time of such "withdrawal;* and after the expiration of one "year from the date of original importation, "and until the expiration of three years from "such date, any merchandise in bond may be "withdrawn for consumption on payment of "the duties *assessed on the original entry* and "charges, and an additional duty of ten per "centum of the amount of such duties and "charges."

Section 33 of the Tariff Act of July 24, 1897.

"Section 33. That on and after the day "when this Act shall go into effect all goods, "wares and merchandise *previously imported, "for which no entry has been made,* and all "goods, wares and merchandise *previously en- "tered without payment of duty and under "bond* for warehousing, transportation, or any "other purpose, for which no permit of de- "livery to the importer or his agent has been "issued, shall be subjected to the duties im- "posed by this Act and to no other duty, up- "on the entry or the withdrawal thereof; *pro- "vided:* That when duties are based upon the "weight of merchandise deposited in any pub- "lic or private bonded warehouse, said duties "shall be levied and collected upon the weight "of such merchandise at the time of its "entry."

United States Revised Statutes, Section 2983.

"In no case shall there by any abatement "of the duties or allowance made for any in- "jury, damage, deterioration, loss, or leakage "sustained by any merchandise, while de-

"posited in any public or private bonded ware-
"house."

Section 34 of the Tariff Act of July 24, 1897.

"That * * * all acts and parts of acts
"inconsistent with the provisions of this Act
"are hereby repealed, said repeal to take ef
"fect on and after the passage of this Act.
"* * *"

POINT I.

Duties at the rate of $1.85 per pound are applicable only to the amount of tobacco received, and cannot lawfully be imposed on water which is never entered for consumption and which forms no part of the taxable subject.

The only paragraph under which duty can be imposed on this merchandise is Paragraph 213 of the Tariff Act of 1897, which, so far as pertinent, reads:

"Wrapper tobacco * * * if un-
"stemmed, one dollar and eighty-five cents
"per pound."

In the present case, the extraneous substance, moisture of sea water, forms no part of the tobacco which enters into consumption in the markets of the United States, and which is withdrawn from warehouse; in other words, the water absorbed during transportation is not a part of the commercial article, tobacco, which the importers sell and for which alone they receive payment. Neither do the importers buy and pay for this

moisture, as the consular invoice shows, and hence it at no time constitutes a part of any *commercial* transaction, and yet the Government exacts duty on that water at the rate of $1.85 per pound.

Clearly Congress did not intend to provide in Paragraph 213 for a duty of $1.85 per pound on "water," when it provided for a duty of $1.85 per pound on "wrapper tobacco." We respectfully submit that, even if it had the constitutional power, Congress certainly did not intend to impose an exhorbitant rate of duty on either air or water.

The duty is a specific rate of $1.85 for every pound of wrapper tobacco imported. It does not authorize the imposition of $1.85 on every fourteen ounces of wrapper tobacco received by the importer, nor a duty of $1.85 a pound on the weight of a package containing wrapper tobacco. It is only wrapper tobacco, dutiable per pound, that Paragraph 213 covers.

If this article of commerce, "wrapper tobacco," contained as a constant constituent the water in question, or if that water constituted a part of the commercial article, tobacco, as withdrawn from bond and entered for consumption, this case would be governed by the rule laid down by the United States Supreme Court in

Ernshaw vs. *Cadwalader*, 145 U. S., 247, 259,

where it was held in effect that in determining the dutiable weight of iron ore no deduction should be made on account of moisture, and that it would be improper to ascertain the number of dutiable tons after first expelling the moisture by heating the ore to 212° Farenheit, because "iron

ore," *as known to the commerce of the United States*, was the ore in its natural state in respect to moisture."

But, in the case at bar, the article of commerce, wrapper tobacco, did not contain this quantity of water as an inherent or generally recognized trade portion of the goods. The added weight was only temporary; it was not present before the goods were shipped, nor was it present when they were withdrawn from bond. The water was an extraneous substance which disappeared before the tobacco became incorporated with the general mass of property in the United States. In other words, the water on which duty was here levied, did not constitute a part of the taxable subject or article of commerce, wrapper tobacco, originally, nor did it constitute a part of the wrapper tobacco which went into consumption in the domestic markets.

It is, therefore, respectfully submitted that this case is controlled by

Seeberger vs. *Wright & Lawther Co.*, 157 U. S., 183.

In the Seeberger case it appeared that there was an ascertainable percentage of impurities, consisting of clay, sand and gravel, in an importation of flax-seed, and the question presented was whether the importer was entitled to an allowance for such impurities. It was held that he was, and that in arriving at the dutiable weight of the merchandise, the weight of the extraneous substances, clay, sand, etc., should be deducted from the gross weight found by the collector.

Mr. Justice BROWN, delivering the opinion of the Supreme Court, said:

"We think the Court below was correct in

"assuming that the flax-seed in question, which "is made dutiable by the act of 1885 at 'twenty "cents per bushel of fifty-six pounds,' less the "tare, means 56 pounds of clean seed, or at "least seed freed from any accidental impur- "ities, such as the clay, sand, and gravel in "question. If this seed had been washed or "otherwise cleansed of these impurities, it cer- "tainly will not be contended that they would "be subject to an increased duty, by means of "such cleansing, or that a bushel of 56 pounds "of such seed would be anything more or less "than a statutory bushel. So if, without such "cleansing, the amount of such impurities can "be fixed at a certain percentage, as the find- "ings in this case assume, we see no objection "to the allowance being made, though the seed "be not in fact cleansed."

157 U. S., page 186.

In the case at bar, the weight of the extraneous water or moisture, is just as readily, and even more accurately ascertainable than was the weight of the clay, sand and gravel in the Seeberger case, *for the reason that the importers have sworn weighers' returns showing in each instance the weight of the merchandise when it is withdrawn from bond;* and the difference between those weights and the weights taken by the Government officials at time of entry, will show precisely how many pounds of water have been taxed at the rate of $1.85 per pound.

Hunter vs. *Corning* (C. C. A.), 86 Fed. Rep., 913, holding that the soakage of barrels of distilled spirits is taxable if extracted from the wood *so as to become merchantable*, impliedly holds that such soakage would not be taxable if it were *not* extracted from the wood so as to become an

article of commerce. Much more then should an extraneous substance or natural element, water (which is valueless in a trade sense, and which has totally disappeared), be held to be not taxable, particularly as it has never become or been recognized as an article of commerce. Further, it is to be noted that the soakage from barrels of distilled spirits is the same in material and character as the spirits which were admittedly dutiable, whereas, in the case at bar, the water is not in any way kindred to the taxable subject.

It is a rule firmly established in the imposition of customs duties that it is only on the quantity of goods actually imported and received by the importer that duty should be assessed, because that is all that enters into consumption or into the commerce of the country, or comes into competition with domestic merchandise; and where the quantity shipped from the port of export is greater than that received by the importer, it is only on the latter quantity that he is required to pay duty.

> *Lawder* vs. *Stone*, 187 U. S., 281, and cases reviewed.

And as the importation is not complete until the withdrawal from bond, and merchandise on such withdrawal is to be treated as though then imported, there is no more reason or justice in imposing a duty on a greater amount than the importer receives from the warehouse than there would be in taxing him for more goods than he received on an importation entered for consumption. As was said by the Supreme Court in relation to the quantity actually received on importation:

> "It is * * * the quantity * * * by "which alone the importer is benefited. It is

"all he can sell again to customers. It is all "he can consume. It is all he can re-export for "drawback."

Marriott vs. *Brune*, 9 How., 619, page 633.

A different case and one governed by *Ernshaw vs. Cadwalader, supra*, would be made if after entry and before withdrawal the importer had, and took advantage of, the oportunity to drive off all moisture and produce an abnormal dryness in the tobacco. As a matter of fact, the sponge-like absorbent character of tobacco, and the fact that just before it is weighed at entry, it has been through ocean transportation, gives to the Government, under the practice of the Collector, an advantage quite as considerable and quite as inequitable, as the importer sought to obtain in *Ernshaw's* case; in the one case the importer sought to produce an abnormal and uncommercial dryness and minimum of weight to decrease duties, and in the other the Government seeks to take advantage of an accidental and unavoidable but abnormal and uncommercial amount of moisture and maximum of weight to increase duties.

The bonded warehouses are not unusually dry places. They have the temperature and other climatic conditions that obtain in the places where this tobacco is manufactured and where it is consumed. The decrease in weight that comes to the tobacco while in such warehouses is but the normal elimination of a quantity of water that but for the ocean transportation would not have been present at all—that was not there when the exporter began the exportation and is not there when the importer receives and uses the importation.

POINT II.

Under the provisions of Section 20 of the Customs Administrative Act of June 10th, 1890, as amended, only such duties should be levied on warehouse goods as would be payable on the goods if imported at the time of withdrawal.

This case is governed not only by the principle of law referred to under Point I, but also by Section 20 of the Customs Administrative Act of June 10, 1890, amended December 15, 1902.

Said Section 20 reads as follows, the amendment of 1902 being shown by the italicized words:

> "Any merchandise deposited in any public "or private bonded warehouse may be with- "drawn for consumption within three years "from the date of original importation on pay- "ment of the duties and charges to which it "may be subject by law at the time of such "withdrawal; *provided, that the same rate of "duty shall be collected thereon as may be im- "posed by law upon like articles of merchan- "dise imported at the time of the withdrawal.* "And provided further that nothing herein "shall affect or impair existing provisions of "law in regard to the disposal of perishable or "explosive articles."

The liability of the importer under this section depends upon a determination of what are the duties to which the goods are subject by law at the time of withdrawal from the bonded warehouse. They are not necessarily the duties ascertained at the time of entry, because the amount then as-

certained or estimated is not fixed or unalterable, but is subject to such change as subsequent circumstances may require. It is kept open by protest or the existence of fraud in the liquidation. But even in the absence of protest or fraud, the liquidation of duties at the time of the warehouse entry is in no case a final liquidation and concludes neither the Government nor the importer, for until the goods are delivered to the importer, they are in the custody and control of the Government, subject to any change that Congress may make in the tariff law. As the practice of warehousing goods is regarded by Congress and the Courts, the importation is not complete until such delivery.

As was said by this Court in *Fabbri vs. Murphy*, 95 U. S., 191, pages 197, 198:

> "Throughout those provisions (*i. e.*, the pro-
> "visions regarding the warehousing of imported
> "merchandise) the plain inference is that *Con-*
> "*gress did not regard the importation as com-*
> "*plete*, while the goods remained in the custody
> "of the proper officers of the customs."

The Court is not to assume that any liquidation is a final liquidation. Indeed, the law gives the Collector the power to re-classify any imported merchandise without re-examination at a different rate of duty from that levied on the first liquidation, and to reliquidate the entry accordingly, even where the merchandise has passed from customs' custody.

United States vs. Phelps, 17 Blatchf., 312;
United State vs. Comarota, 2 Fed. Rep., 145;
T. D., 12655, G. A., 1304;
T. D., 23655, G. A., 5118.

Section 21 of the Act of June 22, 1874, which is still in force, provides:

> "That * * * whenever duties upon any "imported goods, wares and merchandise shall "have been liquidated and paid, and such "goods, wares and merchandise *shall have been* "*delivered* to the owner, importer, agent or "consignee * * * such settlement of duties "shall, after the expiration of one year from the "time of entry, in the absence of fraud, *and in* "*the absence of protest* by the owner, importer, "agent or consignee, be final and conclusive "upon all parties."

In the case of *Paris, Allen & Co.*, T. D., 14689, G. A., 2411, it was held (and the rule there adopted has been approved by the Courts), that if the merchandise remained in the custody of the Collector, as for example in bonded warehouse, the one year Statute of Limitation above quoted would not apply, and that so long as the goods remain in the custody of officers of the Government, or constructively in the possession of the United States, the Collector has the power to re-liquidate, even though more than one year from date of entry has elapsed; all of which is referred to simply as tending to emphasize the point that a liquidation is not to be deemed a fixed and absolutely final determination of what duties are chargeable on a given importation. T. D., 8583, is to the effect that where protests have been made, and entries are up for re-liquidation, all errors in original liquidation may be corrected.

Section 10 of the Tariff Act of March 3d, 1883, provided that imported goods in public stores or bonded warehouses when the act went into effect, should, upon entry for consumption, pay the same

duties as though imported after that date. The section was considered by this Court in the case of *Hartranft vs. Oliver*, 125 U. S., 525, and Mr. Justice FIELD, writing the opinion of the Court, said:

> "Goods imported before the act took effect, "if kept in the custody and control of the gov- "ernment, are to be charged with duties ac- "cording to the law in force when they are en- "tered for consumption; that is *when passed "over to the control of the importer or owner.* "The place in which the goods are thus kept is "not the essential fact, but the custody of the "government, and the consequent exclusion of "control over them by the owner, which *calls "for the suspension of previous duties.* There "is manifest justice in the rule that goods thus "withheld from the control of the owner or im- "porter shall be subject only to such duties as "are leviable by the law when he is at liberty to "take possession of them. Ordinarily, goods in "the custody and control of officers of the cus- "toms are placed in a public store or bonded "warehouse, and thus the designation of the "goods as thus placed is, in the legislation of "Congress, in effect a designation, and no more "of their being in such custody. But goods on "board of a ship, in charge of a custom-house "officer, preliminary to their removal to a "public store or a bonded warehouse, and "during the time necessary for that purpose, "are in like custody, and so are within the "spirit and intent of the law, *subject only to "such duties as are leviable* when the goods are "freed from such custody."
>
> 125 U. S., 525, page 528.

In *United States vs. Goodsell Co.*, 84 Fed. Rep., 439, the Circuit Court of Appeals held that where goods were imported on or prior to August 23d,

1894, but remained in the custody of the Government until after August 28th, 1894, when a new tariff act went into effect, they must be treated as though imported after that date.

The case was followed in *Oppenheimer vs. United States*, 90 Fed. Rep., 796.

Mr. Chief Justice MARSHALL, delivering the opinion of the Supreme Court in

> *Brown vs. State of Maryland*, 12 Wheat, 419, 442,

said,

> "The object of importation is sale; it con-
> "stitutes the motive for paying the duties;
> "* * *. The practice of the most commer-
> "cial nations conforms to this idea. Duties ac-
> "cording to that practice are charged on those
> "articles only which are intended for sale or
> "consumption in the country. Thus sea stores,
> "goods imported and re exported in the same
> "vessel, goods landed and carried over land for
> "the purpose of being re-exported from some
> "other port, goods forced in by stress of
> "weather, and landed, but not for sale, are
> "exempted from the payment of duties."

In the case of The Brig Concord, 9 Cranch., 387, the Supreme Court (opinion of Mr. Justice STORY) held that goods on board a neutral vessel, which was captured by a United States armed vessel and brought into the port of New York, in other words, "goods brought by superior force or by inevitable necessity, into the United States," are not to be deemed imported so as to attach the right to duties until they are "sold or consumed in the country or incorporated into the general mass of its property."

It is settled law also that in the case of property

salved on the high seas and brought into the United States, the Government's right to duties does not accrue *until*, by virtue of a sale, they *"pass into consumption,"* within the United States.

Merritt vs. One Package of Mdse., 30 Fed. Rep. 195; affirmed in 32 Fed. Rep., 111.

In *United States vs. Benson*, Fed Cas., 14577, the United States Circuit Court, for the District of Massachusetts, said:

> "The better opinion is that the importation "of foreign goods is not complete, as between "the importer and the government, as long as "the goods remain in the custody of the officers "of the customs, and that until they are de- "livered to the importer, whether on shipboard "or in warehouse, they are subject to any duties "or imposts which Congress may see fit to im- "pose. The practice of the government shows "that goods in warehouse or on shipboard have "always been regarded as subject to new legis- "lation, both in respect to duties and in respect "to alteration in the warehouse laws."

In *DePass vs. Bidwell*, 124 Fed. Rep., 615, where it was held that goods imported from Porto Rico prior to the passage of the Foraker Act and placed in bonded warehouse, were dutiable under that act when withdrawn subsequent to its passage, RAY, J., delivering the opinion of the Circuit Court, said:

> "Section 20 of the Customs Administrative "Act of June 10, 1890, * * * provides "that any merchandise deposited in any public "or private bonded warehouse, may be with- "drawn for consumption within three (3) "years from the date of original importation "on payment of the duties and charges to which "it may be subject, by law, at the time of such

"withdrawal.' At the time the sugars in ques-
"tion were entered and put in *bond by the*
"owner, they were not subject to duty, as the
"Foraker Act was not a law, and the Dingley
"Tariff Law had ceased to be operative. The
"importer, however, did not see fit to enter
"these goods for consumption at that time, and
"place them upon the market, but, so far as ap-
"pears, voluntarily placed them in government
"custody by making a warehouse entry and al-
"lowing them to remain. While it is true that
"this sugar was imported on or about June 24,
"1899, such importation was not complete and
"did not become a closed transaction so long as
"the goods remained in the custody of the of-
"ficers of the customs. Until withdrawn from
"bond and delivered to the importer, whether
"on shipboard or in warehouse, they were sub-
"ject to any duties which Congress saw fit to
"impose. While in this condition, the goods
"were being imported, and became subject to
"such new legislation in respect to duties and
"in respect to warehouse laws as Congress saw
"fit to enact. The goods were in the possession
"of the Government, left there voluntarily, and
"properly were the subject of new legislation.
"For duty purposes, not having been delivered
"to the importer until after the passage of the
"Foraker Act, *they are to be regarded and*
"treated the same as though they had actually
"arrived at the port of New York after the en-
"actment of that law."

124 Fed. Rep., 615, page 620.

Counsel for the Government may claim that a debt arose (the Government acquiring the right to collect, and the importer being obligated to pay duty) as soon as the goods arrived in the United States; but in answer to such claim, if it be made, it is respectfully submitted that the debt thus aris-

ing was not an absolute but a conditional one, *because the importer had an undoubted right to* place the goods in bonded warehouse, or under general order, and thereafter to export the whole or a portion of them; and on the quantity so exported he either would not be required to pay, or would be entitled to a refund of the duties paid less one per cent. The amount of his refund would be determined by the weight of the goods at the time of exportation (Customs Regulations of 1899, Art. 1121). To adjust the duties with any fairness in such a case, the amount at the time of exportation should agree with the amount which would be collected from the importer if he then received the goods for sale or consumption.

Furthermore, that a fixed and final debt of the importer to the Government did not rise when the goods arrived is clearly shown by the authorities above quoted, including *Hartranft vs. Oliver*, 125 U. S., 525, 528. If the obligations and rights of both importer and Government became fixed and settled in the first instance, clearly the Government would be under an obligation (irrespective of any subsequent change in law) to deliver the goods out of bonded warehouse to the importer whenever the latter duly tendered the amount of duty as determined by the customs officials, at time of importation. But such is not the case here. Let us assume that on the arrival of certain tobacco in the United States and before it was put in warehouse, $5,000, was estimated and fixed by the Collector as the duty to be paid thereon. Subsequently and while the goods are still in bonded warehouse, Congress enacts a law that the immediate coverings on bales of tobacco shall be dutiable (see for example Paragraph 212,

Tariff Act of July 24, 1897), under which the duty on this tobacco would amount to $7,500. After such enactment the importer tenders the $5,000, duty originally fixed, and demands that the merchandise be delivered to him. The Collector declines, and rightly, holding that the Government is entitled to an additional $2,500 in duties or security therefor, prior to delivery. Hence we submit, the debt, which arises on the importation of merchandise that is placed in bonded warehouse is no wise fixed or absolute, but is conditional and cannot become final until such time as the goods are withdrawn for consumption.

Former Section 2979, U. S. R. S., provided that warehoused merchandise might be withdrawn within a year from the date of importation "on payment of the duties and charges to which it may be *subject by law at the time of such withdrawal*"; and after three years from such date might be withdrawn "on payment of the duties *assessed on the original entry* and charges." So that Congress *could not have regarded the duties payable on withdrawal as those liquidated on entry.*

In *Oppenheimer vs. United States*, 90 Fed. Rep., 796, following the case of *United States vs. Goodsell Co.* (C. A. A.), 84 Fed. Rep., 439, it was held that where goods were entered on August 27, 1894, but remained in the actual custody of the United States Government until the 28th, they "*must be treated* as imported on August 28, 1894," and were dutiable under the Tariff Act of 1894, rather than under the Tariff Act of 1890.

Until the time of withdrawal from bond it cannot be finally determined what duties will then be payable on the goods, for the amount must be ascertained under the statutes at that time in

force. When, therefore, the statute provides that the duties payable on withdrawal of goods from bond shall be the duties to which they may then be subject, it clearly requires that the duties shall be such as would be imposed on the goods if imported at the time of withdrawal.

In *Mosle vs. Bidwell*, 130 Fed. Rep., 334, where the merchandise in suit was imported and placed in bond prior to the Ratification of Treaty between the United States and Spain, but wtihdrawn from bond after the ratification and before the passage of the Foraker Act, the Circuit Court of Appeals, in the Second Circuit, construed this section to mean that the duties to be paid on withdrawal from bond were such as should be paid if the goods were imported at the time of withdrawal.

The amendment of 1902 was merely declaratory. It neither added to nor detracted from the scope of the original section. It merely made certain what was already the law, that where goods were held in warehouse until there had been a change in the rate of duty, the rate in force at the time of withdrawal should be applied. In that, as in all other respects, merchandise withdrawn from bonded warehouse is to be treated as though then imported. That is the time when the importation is complete. And *if, until that time, the Government has the same rights in the imposition of duties that it has in relation to merchandise thereafter to be imported, it is but according to the importer a commensurate right that his obligation for duties should be no greater than if the importation were made at that time. It can in no event be less.* If the bond of the importer were to be treated as an absolute contract to pay the duties as ascertained on entry, it would involve, as an equivalent, an agreement on the part of the

Government to deliver up the goods on the payment of that amount. But under the authorities cited, that has never been the construction placed upon the transaction. The undertaking on the part both of the importer and the Government, is subject to all subsequent contingencies effecting a change in the duties payable.

Our learned opponent seems to take the position that a rate of duty is something entirely separate from and independent of the weight of the merchandise. It is submitted that this position is erroneous. The "duties," which Paragraph 213 of the Tariff Act, and Section 20 of the Customs Administrative Act provide, shall be paid when goods are withdrawn from warehouse, could be ascertained in this case only by multiplying the weight or number of pounds of merchandise by $1.85. The rate of duty which Congress provided should be paid on imported wrapper tobacco, according to the preamble and Paragraph 213 of the Tariff Act of 1897 is "one dollar and eighty-five cents *per pound*." It is perfectly clear from this provision that the *weight* is one of the elements of rate. If the rate of duty on tobacco were, say, $1.00 per pound, it could not logically be said that although $500 duty was exacted on 250 pounds of tobacco, nevertheless that tobacco paid the same rate of duty as 500 pounds of tobacco on which the same amount of duty, $500, was charged. We submit that the result of exacting $500 duty on 250 pounds of tobacco would be to make that 250 pounds pay duty *at the rate of $2 per pound*, whereas the 500 pounds of tobacco would pay duty at the rate of $1.00 per pound.

On precisely the same reasoning in the case at bar, it could not be said that when the Collector exacted $995.30 duty on 530 pounds of tobacco withdrawn

from warehouse, and entered for consumption, he was exacting duty at the rate of $1.85 per pound (see withdrawal entries covering Bales 2243, 2244 and 2263, and the sworn weigher's returns of their actual weight on withdrawal). On the contrary, he was exacting duty contrary to the express provisions of Section 20 and Paragraph 213, at the rate of $1.875 per pound. And we respectfully submit such exaction was not warranted by law.

It is inconceivable that in passing Section 20 of the Customs Administrative Act, and using the words "duties and charges to which it (the merchandise) may be subject by law *at the time of such withdrawal*," Congress could have meant the duties and charges to which it was subject by law *at the time of importation*." If it had so intended, it seems reasonable to assume that it would have used language somewhat as follows:

> "Merchandise deposited in warehouse may be "withdrawn for consumption within three "years on payment of the duties which accrued "at time of entry."

But such was not the legislative intent. Congress intended according to the plain import of the words used, to provide that warehoused merchandise might be withdrawn on payment of the same duty to which it would have been subject if originally imported at the time of its withdrawal from bond.

If Section 20 were construed to mean that warehoused goods might be withdrawn on payment of the duties which accrued at the time of original importation, the section would seem to be superfluous, because no one would suppose for a moment that an importer, by leaving goods in bond, instead of taking them at once and paying the duty, could escape the payment of duty entirely.

POINT III.

The proviso appended to Section 33 of the Tariff Act of July 24th, 1897, applies only to merchandise imported before the date when that Act took effect.

As none of the importations in the case at bar were made prior to July 24th, 1897, Section 33 has no application in this case.

In the Court below the soundness of this proposition and of the decision of the Circuit Court upholding it was conceded. The learned Attorney-General, however, contends that the proviso is of general application, and has presented the point as having considerable importance, but the unsoundness of the Government's position is patent upon an examination, not only of the language of the section, but of the rules governing its construction.

Section 33 reads:

> "That on and after the day when this act "shall go into effect, all goods, wares and "merchandise previously imported, for which "no entry has been made, and all goods, wares "and merchandise previously entered without "payment of duty and under bond for ware-"housing, transportation or any other purpose, "for which no permit of delivery to the im-"porter or his agent has been issued, shall be "subjected to the duties imposed by this Act, "and to no other duty upon the entry of the "withdrawal thereof: Provided, That when "duties are based upon the weight of merchan-"dise deposited in any public or private bonded "warehouse, said duties shall be levied and col-

"lected upon the weight of such merchandise "at the time of its entry."

Reduced to its simplest terms, the section, so far as it refers to bonded warehoused merchandise, would read:

"That goods heretofore entered, without pay- "ment of duty, and under bond for warehouse, "shall be subject to the duties imposed by this "act, upon the withdrawal thereof. Provided, "that when duties are based upon the weight "of such merchandise, they shall be levied and "collected upon the weight of such merchandise "at the time of its entry."

That is the whole scope and meaning of the section, construed in accordance with the rule that a proviso refers only to the provision of a statute to which it is appended. That rule has become so firmly established, in stautory construction, that it would hardly seem now to be open to argument.

Minis vs. United States, 15 Peters, 423;
United States vs. Dickson, *id.*, 141;
United States vs. Slazenger, 113 Fed. Rep., 525;
Endlich on Inter. of Stat., Sec. 186.

This Court has stated the rule in Minis vs. United States, at pages 445-6 of 15 Peters, as follows:

"The office of a proviso, generally is either to "except something from the enacting clause, or "to qualify or restrain its generality, or to ex- "clude some possible ground of misinterpreta- "tion of it, as extending to cases not intended "by the Legislature to be brought within its "purview. A general rule, applicable to all "future cases, would most naturally be ex-

"pected to find its proper place in some distinct "and independent enactment."

And in United States vs. Dickson, at page 165, of 15 Peters:

"* * * we are led to the general rule of "law which has always prevailed, and become "consecrated almost as a maxim in the inter- "pretation of statutes, that where the enact- "ing clause is general in its language and ob- "jects, and a proviso is afterwards introduced, "that proviso is construed strictly and takes no "case out of the enacting clause which does not "fall within its terms. In short, a proviso "carves special exceptions only out of the en- "acting clause, * * *."

The general understanding of the rule is stated in Endlich on Interpretation of Statutes, Section 186:

"From a consideration of the office and func- "tion of a proviso, it would seem to follow that "it can have no existence, separate and apart "from the provision which it is designed to "limit. * * * Moreover, a proviso is al- "ways to be construed with reference to the im- "mediately preceding parts of a clause to "which it is attached, and limits only the pas- "sage to which it is appended, and not the "whole section or act, at least only the section "with which it is incorporated."

In the section under consideration, the enacting clause imposed the duties prescribed by that Act upon all goods *previously* imported, and which had either not been entered, or had been entered without payment of duty, and under bond for warehouse, or any other purpose, and as to such goods under bond, and in warehouse, the duties were by

the proviso, made payable on the weight at the time of entry.

The duties by the enacting portion of the section imposed on goods previously imported and then in bonded warehouse were such as would be payable on the same goods imported at the time of withdrawal under Section 20 of the Customs Administrative Act, as amended by the Act of October 1st, 1890. So that the special proviso was necessary if previously imported goods were to be dutiable on their weight at the time of entry. Not without ignoring the plain language of the section and the highest judicial precedent, can the proviso be read and construed apart from the preceding portion of the section. As the section was enacted it furnishes no ground for the contention that merchandise generally, or merchandise subsequently imported should be assesed for duty upon its weight at the time of entry.

The decision in *United States vs. Whitridge*, 197 U. S., 135, is not an authority that the proviso contained in the paragraph under consideration herein may be construed independently of the single clause it certainly modifies. The proviso (if it can be technically termed so) in the *Whitridge* case was, in fact, added to the body of a section passed twenty-four years after the original enactment thereof, and to accomplish a separate and distinct purpose. It certainly did cover more than the main clause in that section, and was clearly broader than the section itself, whereas, the proviso in this case can and should be limited to the particular section to which it is attached.

There are no reasons here, as there were there, for not limiting the proviso to the subject-matter of the clause qualified by it, in accordance with the gen-

eral rule, assuming, but not conceding, that it could be extended. The learned Court, moreover, in the case of *Whitridge*, in so many words confined its decision to the particular case before it, being careful to say at the close of its opinion (p. 146) "We confine our decision to the particular case"; and expressly stated and approved the general rule that (p. 143), "the grammatical and logical scope of a proviso is confined to the subject-matter of the principal clause." The case surely does not hold that a clause which is in form a proviso and can consistently be limited to the paragraph may ever be construed as a wholly independent section—the bold proposition now advanced by the Government. We confidently believe that when this Court re-examines the opinion in the Whitridge case it will again conclude that the decision there rendered is applicable only to its facts and that it cannot properly be cited as an authority in this case, for the position taken by the Government. This Court has said, in the case of *Arthur vs. Morrison* (96 U. S., 108), that a well known rule of construction remains in force until abolished by Congress.

It is of course the intent of the statute that must prevail, but that intent must be gathered from the language used. In the case of Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, at pages 36-37, Mr. Justice HARLAN, writing the opinion of this Court, said:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden vs. Collector*, 5 Wall., 107,

111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' "

The meaning of the statute may not be looked for in the opinions of *individual* legislators.

In re Schilling, 53 Fed. Rep., 81, the Circuit Court of Appeals had under consideration a statute where, as appears in the opinion, it was [illegible]ted by members of each branch of the comm[illegible] conference, that the clerks of the two comm[illegible] in preparing the report made a mistake by e[illegible]ing the parenthesis in the wrong place."

The Court said:

"Apart from the declarations of the members "of the conference committees upon the floor "of congress, it could hardly be claimed that "the intent of the statute plainly required a "change in the punctuation. An inference "could be drawn from the history of the statute "before it reached the committees of confer- "ence, but, in view of the manifest limitation "by the parenthesis, such an inference would "not be controlling. Are, then, the declarations "of the members of the committees sufficient to "authorize a court to change the manifest "meaning of a statute as it passed the legis- "lative body and received the approval of the "president, and to construe it in accordance "with the intention of the committees? I think "that such a judicial construction of a statute "is akin to judicial legislation, which, as con- "gress has refused to act upon the subject, it is "well to avoid."

In re Downing, 56 Fed. Rep., 470, at page 474:

> "When the language of a statute is plain and "unequivocal it is not permissible to search for "another meaning, which may have existed in "the minds of individual legislators, and find- "ing that meaning, to substitute it for the "meaning expressed."

It was sought in that case to show the meaning of the statute by statements in a report of a senate committee.

In American Net & Wire Company vs. Worthington, 141 U. S., 468, the Supreme Court said that

> "the statements made and the opinions ad- "vanced by the promoters of the act in the "legislative body are inadmissible as bearing "upon its construction, although reference to "the proceedings of such body may properly be "made to inform the court of the exigencies of "the fishing interest and the reasons for fixing "the duty at this amount."

United States vs. Union Pacific R. R. Co., 91 U. S., 72, at page 79, this Court said:

> "In construing an act of Congress, we are "not at liberty to recur to the views of individ- "ual members in debate, nor to consider the "motives which influenced them to vote for or "against its passage. The act itself speaks the "will of Congress, and this is to be ascertained "from the language used."

So in this case, the statute itself, construed in accordance with settled rules, must be presumed to speak the will of Congress, and the construction limiting the proviso to the previous portion of the paragraph, is that required by the language and form of the statute which Congress has adopted.

POINT IV.

Even if the proviso of Section 33 were of general application it does not warrant the imposition of duty on sea water.

By its terms the proviso applies only to duties to be levied and collected upon the "weight of *merchandise*," and the moisture absorbed during the sea voyage, and which evaporates in the warehouse is not merchandise even when combined with a taxable article. The merchandise of the importation, that is, the tobacco, weighed the same at the time of entry as at the time of withdrawal.

Thus formerly, in an importation of flax-seed, if each bushel of 56 pounds contained two pounds of impurities, the duty by the Tariff Act imposed upon flax-seed would be assessed on only 54 pounds in each bushel, as was decided in the case of Seeberger vs. Wright, *supra*. Similarly, in an importation of tobacco, if in each bale weighing 180 pounds on entry, the weight of the tobacco is only 178 pounds, the duty is required to be levied only on the 178 pounds of tobacco, that being the only merchandise contained in the bale. The additional two pounds of accidental and temporary moisture is not merchandise.

Such a construction is in accordance with principles of natural justice and equity, and the rule of general application in the construction of revenue laws, that an importer shall be required to pay duty only on the merchandise actually imported by him, *and which enters into consumption* in the United States. The liability of the importer is to be determined in the light of the whole scope and purpose

of the revenue laws. However extensive the taxing power of Congress may be, whether for the purpose of raising revenue or protecting American manufactures, it may safely be assumed that it is the intention of Congress to impose duties only on imported *merchandise;* that no legislative body ever had in mind taxing sea water that never entered into consumption, or any other substance without commercial value, even when accidentally combined with merchandise at the time of landing. Such a tax surely could not be a legitimate source of revenue, and could serve no protective purpose. It would be utterly foreign to every theory of taxation. In applying the revenue laws the Courts have adopted the equitable rule that burdens shall not be imposed on a taxpayer beyond what is expressly required by statute and when the result would be to subject an importer to a duty on something he never receives, and which is utterly worthless, the statute should not be given an application beyond what its language imperatively requires.

POINT V.

There was no "loss" of the imported merchandise with the provisions of Section 2983 U. S. R. S.

It is respectfully submitted that Section 2983 of the U. S. Revised Statutes is not applicable to the present case. That section reads:

> "In no case shall there by any abatement of "the duties or allowance made for any injury, "damage, deterioration, loss or leakage sus- "tained by any merchandise, while deposited in "any public or private bonded ware house."

If, as contended by the importer, and may be held to be established by the authorities referred to in Point II of this brief, merchandise on withdrawal from warehouse is to be treated the same as though then imported and duty assessed accordingly under Section 20 of the Act of June 10, 1890, as amended December 15, 1902, Section 2983 can only be applied to merchandise that does not come within the provisions of Section 20, such as the merchandise covered by Section 33 of the Tariff Act of 1897, referred to in the Third point, and cannot apply where it would be in conflict with Section 20, a later enactment.

Whether or not Section 2983 and Section 20 would in any event be conflicting, it is not material here to consider, for Section 2983 could be applied to no case not therein provided for and it does not, either by its terms, or any reasonable implication, cover a reduction in weight such as has occurred here.

The words "loss" and "damage" as employed in Section 2983, seem to have the ordinary meaning that would be attributed to them if they were used in any fire insurance policy, or in common speech. In the case at bar, there has been no loss of any goods. None of the taxable subject has disappeared. The importer received from the warehouse all the merchandise he entered. It is only the moisture contained in the goods that is absent, and that is no loss of the tobacco. Every other term in the provision refers to some actual loss of value or amount of goods. But here none of the tobacco was either lost or injured or damaged, or deteriorated. Every pound of tobacco that was entered is present and uninjured.

To obtain a correct idea of the scope, purpose

and meaning of Section 2983, it should be considered in connection with Section 2984 of the U. S. Revised Statutes. Said Section 2984, so far as pertinent, reads as follows:

> "Sec. 2984. *Abatement and refund in case "of injury by casualties.* The Secretary of the "Treasury is hereby authorized, upon produc- "tion of satisfactory proof to him of the actual "injury or destruction in whole or in part, of "any merchandise, by accidental fire, or other "casualty while the same remained in the "custody of the officers of the customs in any "public or private warehouse under bond "* * * to abate or refund, as the case may "be, out of any moneys in the Treasury not "otherwise appropriated, the amount of import "duties paid or accruing thereupon; and like- "wise to cancel any warehouse bond or bonds, "or enter satisfaction thereon in whole or in "part as the case may be."

Sections 2983 and 2984 originally formed part of the same Act of Congress, to wit, the Act of March 28, 1854, entitled, "An Act to extend the warehousing system by establishing private bonded warehouses, and for other purposes." Section 2983 is extracted from Section 4, and Section 2984 is extracted from Section 8 of the Act of March 28, 1854.

The apparent hardship which Section 2983 imposed upon importers is greatly lessened, and its scope and effect limited by the terms of Section 2984. In effect, Section 2984 provides that there may be an abatement or refund of duties on warehoused goods by the Secretary of the Treasury in case they are injured or partially or wholly destroyed by accident. Thus, on merchandise in warehouse that sustained damage, or partial or

total loss through explosion, flood, lightning, accidental fire or other casualty, duty allowance or rebate might be made.

It clearly appears that what is now Section 2983 of the Revised Statutes, was designed to prohibit any reduction or abatement of duties for any loss of damage or injury to warehouse goods, due to some cause *other* than "accidental fire or other casualty." Both Sections 2983 and 2984 clearly refer to an actual loss or reduction in the amount of the goods. As was said by Judge TOWNSEND, writing the opinion of the Circuit Court of Appeals:

> "* * * by these two sections the im-
> "porter is protected in case of loss of ware-
> "house merchandise by casualty; the govern-
> "ment is protected in case of loss of merchan-
> "dise from any other cause. It is clear that
> "evaporation of moisture is not 'loss * * *
> "sustained by * * * merchandise.'"

While every statute must be construed with a view to the intention of the Legislature in passing it, that intention must be gathered from the language used (United States vs. Freight Association, 166 U. S., 290, 318, and cases cited). There is nothing here to indicate that by the provisions of this section, Congress intended anything beyond the scope and meaning of the words in which it is expressed. In prohibiting any allowance for "loss" of goods, it is but a reasonable presumption that the prohibition was directed against an allowance on goods lost in bonded warehouse, whether by leakage or otherwise. It cannot be regarded as a loss of goods that a foreign substance has been eliminated from them by whatever process the elimination may have occurred. It

may be conceded that loss would cover evaporation of wine or the "melting" of sugar, for the quantity of the article itself would be reduced thereby. But the disappearance of the accidental moisture in the present case is no more a loss of the tobacco than it would have been a loss of the flax-seed in Seeberger's case, *supra*, if the seed had been stored in warehouse in meal bags and, in the course of handling, the dust had sifted out.

POINT VI.

It is submitted that by the plain terms of the statutes governing the case, the importers were required to pay duty only on the amount of tobacco they received from the bonded warehouse, but if there could be deemed to be any doubt as to the meaning or intent of any of the statutes, the construction should be in favor of the importers.

A rule so firmly established in the construction of revenue laws it is doubtless unnecessary to call to the attention of this Court, even by a brief reference. Writing the opinion of this Court in Eidman vs. Martinez, 184 U. S., 578, Mr. Justice BROWN said, at page 583:

> "We have ourselves had repeated occasion to "hold that the customs revenue laws should be "liberally interpreted in favor of the importer, "and that the intent of Congress to impose or "increase a tax upon imports should be ex- "pressed in clear and unambiguous language.

"Hartranft vs. Weigmann, 121 U. S., 609;
"American Net & Twine Co. vs. Worthington,
"141 U. S., 468; United States vs. Wiggles-
"worth, 2 Story, 369; Powers vs. Barney, 5
"Blatchford, 202."

The respondents contend that the language of Section 20, the law governing this case, authorizing the withdrawal of warehoused goods on payment of the duties to which they are subject at the time of withdrawal, *clearly* entitles them to the relief that they ask, and that neither Section 33 of the Tariff Act of 1897, nor Section 2983 of the Revised Statutes had any application; but if it be found either that the question is not free from doubt, or that the lawmakers failed to express *in clear and unambiguous language* their intent, if intent it was, to charge high duty on water as well as tobacco, and to exact payment of duties based on the weight of the merchandise at time of its entry, as distinguished from time of withdrawal from bond, then, also, the respondents are entitled to the relief that they ask.

POINT VII.

The decision of the United States Circuit Court of Appeals should be affirmed and the cause remanded with instructions to the United States Circuit Court to enter judgment accordingly.

Dated New York, Nov. 28, 1906.

Respectfully submitted,

HATCH, KEENER & CLUTE,
Attorneys for Respondents.

JOHN G. CARLISLE,
EDWARD S. HATCH,
J. STUART TOMPKINS,
Of Counsel.